Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1443

F. DAVID M[illegible]EWS, PETITIONER

—v.—

MISTER SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 9, 1976
CERTIORARI GRANTED JUNE 1, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1443

F. DAVID MATHEWS, PETITIONER

—v.—

MISTER SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/22/74	Complaint filed. . . .
9/26/74	Govt. files Motion to Dismiss Pltf's. Complaint, with Brief in Support and cer. of ser. thereon.
11/13/74	Pltf. files Reply Brief to Defendant's Brief in Support of Motion to dismiss Plaintiff's Complaint with proof of service thereon.
11/15/74	Order Entered: The deft's. Motion to Dismiss is Granted. This cause is ordered dismissed as this court is without jurisdiciton over the subject matter of this suit. (SE) Sharp, Judge. Copies to counsel.
12/13/74	Deft. Mister Sanders files Notice of Appeal of order of court to dismiss this cause for the reason that the court is without jurisdiction over the subject matter of this suit.
12/13/74	Clerk's Certificate prepared. Copies to counsel and Ct. of Appeals.
12/13/74	Pltf. files Bond for Costs.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No. H-74-146

MISTER SANDERS, PLAINTIFF

vs.

CASPER WEINBERGER, United States Secretary of Health, Education and Welfare, DEFENDANT

COMPLIANT FOR REVIEW OF DECISION OF SECRETARY OF HEALTH, EDUCATION AND WELFARE

Plaintiff complains of defendant and says:

1. That plaintiff is and has been a resident of East Chicago, Lake County, Indiana, within the District and Division of this Court continuously since a time prior to June 30, 1962. Plaintiff presently resides at 609 East 150th Street, East Chicago, Indiana.

2. This Court has jurisdiction to hear and determine this complaint pursuant to the laws of the United States as set forth in 42 U.S.C. Section 405(g).

3. This action is an appeal from the decision of the Appeals Council, Department of Health, Education and Welfare, Social Security Administration.

4. This action is commenced within sixty days of the decision of said Appeals Council, said decision being dated April 5, 1974.

5. That said decision of the Appeals Council constitutes the final decision of the Social Security Administration and the Secretary of Health, Education and Welfare and all administrative remedies have been exhausted.

6. That the findings of the Appeals Council are not based upon substantial evidence and are contrary to fact and law.

7. That the record of the administrative law judge will disclose error on the face of the evidence upon which his decision was based.

8. That a copy of the decision of the administrative law judge is attached hereto, made a part hereof and marked Exhibit "A"; that a copy of the decision of the Appeals Council is attached hereto, made a part hereof and marked Exhibit "B".

9. That the undersigned has been the attorney for plaintiff since the date of the decision of the administrative law judge on January 15, 1974, and the undersigned is entitled to reasonable fees for his services herein.

10. That the date of Exhibit "A", January 15, 1973, is in error, the correct date being January 15, 1974.

WHEREFORE, plaintiff prays the Court to review the decision of defendant, to enter an order consistent with the Court's findings, to award appropriate attorney fees and for all other proper relief.

KOWALSKI, KANZ AND O'DROBINAK

By /s/ William A. Kowalski
WILLIAM A. KOWALSKI
Attorneys for the Plaintiff
723 W. Chicago Avenue
East Chicago, Indiana 46312
(219) 397-7233

EXHIBIT A

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

ORDER OF DISMISSAL

In the case of

Mister Sanders
(Claimant)

(Wage Earner) (Leave blank if same as above)

Claim for

Period of Disability and
Disability Insurance Benefits

260-36-4656
(Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

This case is before the undersigned Administrative Law Judge upon a request for hearing filed on October 3, 1973 by the claimant, Mister Sanders, who disagrees with the determination of the Bureau of Disability Insurance, Social Security Administration, that he is not entitled to a period of disability and disability insurance benefits under the Social Security Act.

The claimant filed a prior application for a period of disability and disability insurance benefits on January 30, 1964. The claimant complained of various impairments in that first application that included epilepsy and "blackout spells" which he alleges caused him to be unable to work for about 4½ years prior to his application

of January 30, 1964. On June 2, 1965, the claimant was notified by the Bureau of Disability Insurance Benefits, Social Security Administration that his application was denied. He requested reconsideration of this denial and was subsequently notified by a letter dated October 29, 1965 that the original denial had been affirmed. Thereafter, the claimant still being dissatisfied filed a request for hearing and a hearing was held on December 21, 1965. The Hearing Examiner (now called Administrative Law Judge) affirmed the Administration on February 24, 1966 and determined that the claimant was not entitled to disability insurance benefits or to a period of disability. The Appeals Council by a letter dated June 13, 1966 notified the claimant that the decision of the Administrative Law Judge was the final decision of the Secretary of Health, Education and Welfare and advised the claimant that he had the right to commence a civil action in the United States District Court within sixty days to review the decision of the Administrative Law Judge. The claimant did not file a civil action for review in the United States District Court. The claimant filed a second application to establish a period of disability and for disability insurance benefits on March 5, 1973, wherein he again alleged epilepsy and "blackout spells." On May 25, 1973, the claimant was notified by the Bureau of Disability Insurance, Social Security Administration, that his application was denied. He requested reconsideration of this denial and was subsequently notified by letter dated September 28, 1973. that the original denial had been affirmed. Thereafter the claimant still being dissatisfied, filed a request for hearing on October 3, 1973. Since the decision of the Administrative Law Judge on February 24, 1966, the claimant submitted additional medical evidence that indicates that the claimant has complained of epilepsy and "blackout spells" since 1964.

ISSUES AND APPLICABLE LAW

The general issue before the Administrative Law Judge is whether the claimant is entitled to a period of dis-

ability and to disability insurance benefits under the Act. The specific issue is whether the claimant is entitled to have his prior application reopened since more than four years have elapsed since the decision of the Administrative Law Judge on February 24, 1966 and the claimant last met the earnings requirements of the Social Security Act on June 30, 1962.

20 CFR 404.937 provides:

> "The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> (a) Res judicata. Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision . . ."

20 CFR 404.951 provides:

The Appeals Council may deny a party's request for review or it may grant review and either affirm or reverse the Administrative Law Judge's decision. The decision of the Appeals Council, or the decision of the Administrative Law Judge where the request for review is denied (see 404.947), shall be final and binding upon all parties to the hearing unless a civil action is filed in the district court of the United States under the provisions of section 205(g) or section 1869(b) of the Act, or unless the decision is revised under the provisions described in § 404.956.

20 CFR 404.957 provides in pertinent part:

> . . . a decision of a hearing examiner (Administrative Law Judge) which is otherwise final . . . § 404.951 may be reopened:
>
> • • • •
>
> (c) at any time when
>
> • • • •
>
> (8) such . . . decision . . . is unfavorable, in whole or in part, to the party thereto but only for the purpose of correcting . . . error on the face of the evidence on which such . . . decision was based.

RATIONALE

The Appeals Council on June 13, 1966 specifically advised the claimant that the decision of the Administrative Law Judge was the final decision of the Secretary of Health, Education and Welfare and that the claimant had the right to request a review in the United States District Court within sixty days of that final decision pursuant to section 205(g) of the Social Security Act (42 U.S.C. § 405(g)). The claimant did not file for a review in the United States District Court and the decision of the Administrative Law Judge became final and binding upon the claimant. Since more than four years have elapsed since the decision became final it can only be reopened under the provisions of 20 CFR 404.957 (c)(1) through (9). The only possible applicable section is 20 CFR 404.957(c)(8). I find that there is no error on the face of the evidence on which the decision of February 24, 1966 was made.

In order for the claimant to be entitled to a period of disability or to disability insurance benefits, it was necessary for him to establish that he was under a "disability" commencing on or prior to June 30, 1962 when he last met the earnings requirements of the Act. Since the claimant's special earnings requirement expired on June 30, 1962, there is no unadjudicated period subsequent to the final decision of the Secretary on February 24, 1966. The parties and the issues are the same in the both applications and the additional medical evi-

dence is merely repititions and cumulative. The allegations of the claimant and the additional evidence submitted do not warrant a change in the conclusion reached in the prior decision. Any further adjudication of these identical matters is barred under the doctrine of *res judicata*.

It is well settled that a claimant may not, by filing repeated applications obtain repeated determinations or decisions with respect to the same issues or renew rights which he allowed to lapse by his failure to seek administrative or judicial review within the statutory period for

EXHIBIT B

[SEAL]

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518, Washington, D.C. 20018

5 APR 1974

REFER TO IRA-2
260-36-4656

BUREAU OF
HEARINGS AND APPEALS

ACTION OF APPEALS COUNCIL ON REQUEST
FOR REVIEW OF
ADMINISTRATIVE LAW JUDGE'S DISMISSAL

Mr. Mister Sanders
609 East 150th Street
East Chicago, Indiana 46312

Dear Mr. Sanders:

Your request for review of the administrative law judge's dismissal has been carefully considered by the Appeals Council. The Council's consideration of your case included the law and regulations applicable to your claim, the action taken by the administrative law judge and your reasons for believing that your request for hearing should not have been dismissed.

The Appeals Council has concluded that the dismissal action of the administrative law judge is correct. Ac-

cordingly, the determination dated February 24, 1966, stands as the final determination of this Department.

Sincerely yours,

/s/ [Illegible]
Acting Member,
Appeals Council

cc:

Mr. William A. Kowalski
Attorney at Law
East Chicago, Indiana 46312

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Hammond Civil No. H 74-146

MISTER SANDERS, PLAINTIFF,

vs.

CASPAR WEINBERGER, Secretary of the United States Department of Health, Education and Welfare,
DEFENDANT.

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Comes now the Defendant, Caspar Weinberger, Secretary of the Department of Health, Education and Welfare by his attorney, John R. Wilks, United States Attorney for the Northern District of Indiana, and moves the Court to dismiss the Complaint herein on the grounds that it fails to state a cause of action upon which relief may be granted and that this Court is without jurisdiction over the subject matter herein, as further appears from the exhibits and memorandum of law filed herewith.

Respectfully submitted,

JOHN R. WILKS
United States Attorney

By: /s/ Richard A. Hanning
RICHARD A. HANNING
Assistant United States Attorney

Office of the United States Attorney
Federal Building, Room 312
507 State Street
Hammond, Indiana 46320

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil Action No. H 74-146

MISTER SANDERS, PLAINTIFF

vs.

CASPER WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT

AFFIDAVIT OF H. DALE COOK

COUNTY OF ARLINGTON)
) ss
STATE OF VIRGINIA)

I, H. DALE COOK, being first duly sworn, depose and say as follows:

(1) I am Chairman of the Appeals Council and Director of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare. The Bureau of Hearings and Appeals includes, besides the Appeals Council itself, administrative law judges, formerly called "hearing examiners," who hold hearings on claims arising under title II of the Social Security Act, as amended, when such hearing is duly requested by a claimant who is dissatisfied with the administrative determination of his claim.

(2) One of the functions of the Appeals Council is to pass upon requests for review of hearing decisions rendered by the administrative law judges and to either grant, deny or dismiss any such request. Under the regulations and practice of the Social Security Administration, if the Appeals Council denies a timely request for review of a hearing decision, that decision thereupon becomes the "final decision" within the meaning of, and subject to, the provisions for judicial review in section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. section 405(g), the first sentence of which reads as follows:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * *"

(3) It is provided in Social Security Administration Regulations No. 4, section 404.937 (20 CFR 404.937) that a request for a hearing may be dismissed, either entirely or as to any stated issue, on the basis of res judicata. Res judicata is defined in the same regulations, section 404.937(a) (20 CFR 404.937(a)) as follows:

> "Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision * * *."

Sections 404.937a and 404.937b of Regulations No. 4 (20 CFR 404.937a and 404.937b) direct that notice of any such dismissal and the right to request review thereof by the Appeals Council shall be given to a party, and that such dismissal shall be final and binding on the parties unless vacated.

(4) It is provided in Regulations No. 4, section 404.945 (20 CFR 404.945) that where a hearing decision has been made or a request for hearing dismissed, any party thereto may request the Appeals Council to review such decision or dismissal.

(5) I am responsible for the maintenance of Departmental files relating to functions performed by administrative law judges and the Appeals Council on claims arising under title II of the Social Security Act, as amended, including decisions and orders therein and correspondence in reference thereto. The official file main-

tained by the Bureau of Hearings and Appeals relating to the claim of the plaintiff, MISTER SANDERS, under title II of the Social Security Act, was examined under my supervision, and to the best of my knowledge and belief said file shows that:

(a) The plaintiff last met the special earnings requirements of the Act for disability purposes on June 30, 1962.

(b) On January 30, 1964, the plaintiff filed his first application for a period of disability and disability insurance benefits. This claim was denied initially and on reconsideration. On February 24, 1966 an administrative law judge issued a decision holding that the plaintiff was not entitled to disability insurance benefits or to a period of disability (Exhibit 1). The plaintiff thereafter requested the Appeals Council to review the decision of the administrative law judge, and on June 13, 1966 he was notified that his request for review was denied and that he had a right to commence a civil action in the United States District Court within sixty days to review the decision of the administrative law judge (Exhibit 2). The plaintiff did not file a civil action for review in the United States District Court.

(c) On March 15, 1973, the plaintiff filed a second application for a period of disability and disability benefits. This claim was denied initially and on reconsideration. Thereafter, on October 3, 1973, the plaintiff filed a request for hearing. On January 15, 1974, an administrative law judge issued an order dismissing the request for hearing on the grounds of res judicata (Exhibit 3). In his complaint, the plaintiff has made reference to the incorrect dates on the Notice of Dismissal and Order of Dismissal, which were dated January 15, 1973 instead of January 15, 1974. On March 5, 1974, the plaintiff requested the Appeals Council to review the action of the administrative law judge. By letter dated April 5, 1974, the plaintiff was advised of the Appeals Council's conclusion that the "dismissal action of the administrative law judge is correct" and that "the determination dated February 24, 1966, stands as the final determination of this Department" (Exhibit 4).

(6) On May 22, 1974, the plaintiff filed a civil action in the United States District Court for the Northern District of Indiana, Hammond Division.

/s/ H. Dale Cook
H. DALE COOK

Subscribed and sworn to before me this 5th day of September, 1974.

/s/ Marilynn H. Garrison

NOTARY PUBLIC, County of Arlington, State of Virginia. My Commission Expires November 28, 1976

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

NOTICE OF DECISION

PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision of the hearing examiner, you may request the Appeals Council to review it. However, your request for review must be filed *within 60 days* following the date shown below.

You, or your representative, may file the request for review at the nearest district office of the Social Security Administration, with the hearing examiner, or with the Appeals Council.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g) of the Social Security Act.

This notice and enclosed copy of Hearing Examiner's Decision mailed to the claimant on February 24, 1966.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

HEARING EXAMINER'S DECISION

In the case of

Mister Sanders
(Claimant)

Mister Sanders
(Wage Earner)

Claim for

Disability Insurance Benefits
260-36-4656
(Social Security Account Number)

This case is before the Hearing Examiner upon the request for hearing filed on November 16, 1965, by Mister Sanders, the claimant, who disagrees with the reconsideration determination of the Social Security Administraton, Department of Health, Education and Welfare, of which he was notified by letter dated October 29, 1965. After due notice a hearing was held before the undersigned Hearing Examiner on December 21, 1965, at Chicago, Illinois. The claimant was present and participated in the hearing.

The record shows that the earnings requirements for disability purposes were not in the alleged quarter of disability and continued to be met through the calendar quarter ending June 30, 1962.

STATEMENT OF CLAIMANT'S ALLEGATIONS AND TESTIMONY

The determination from which the claimant appeals is that denying his application for a period of disability and/or disability insurance benefits filed on January 30,

1964, under sections 216(i) and 223 of the Social Security Act, as amended (42 USC 416(i) and 423). It was determined that the claimant's impairments were not of sufficient severity as to preclude him from engaging in any substantial gainful activity from about 4½ years ago, the alleged date of onset of disability, and during the life of his application filed on January 30, 1964, or at any time prior to the expiration of the earnings requirements, whichever first occurred. In the request for hearing filed by the claimant he states: "I feel I am disabled. The doctor has not released me to return to work."

In his application the claimant stated that he was born on March 18, 1929; that he completed three grades in school; that he worked in the steel mill as a bricklayer's helper; and that he last was able to work in 1960. He described his impairment as mental condition, trouble with left abdomen.

In his testimony at the hearing the claimant stated that his correct date of birth is March 18, 1929. His formal schooling extended to the fifth grade.

His first employment was field work, including chopping and hoeing cotton, picking peas. He worked about five years at a service station pumping gas, fixing flat tires and washing cars. For a number of years he was a helper in construction work and then in a foundry. He was a mobile operator at a steel company. When the furnace was tapped, he pushed out the slag from underneath the oven hearth. The vehicle he drove had one pedal and two levers, one for the left and one for the right. His next employment until about eight years ago was as a mason helper, carrying mud and bricks in a wheelbarrow to the bricklayers. He was terminated because they said he was not doing his work.

In 1964 he felt pretty good and looked for a job. He worked three or four weeks breaking steel with a 12 pound hammer. He got weak and had to quit.

With respect to his health, claimant said he probably has been ill about eight years. He had headaches and saw Dr. Fleischer who gave him some medicine to take two

or three times a day. In 1960 or 1961 he was hospitalized for removal of hemorrhoids.

He changed to Dr. Broomes who gives him electric treatments for his neck and head. Claimant stated pains go down from his head to his neck and shoulders.

Claimant's stomach started giving him trouble about a year ago. He has a weak place on the left side; when he eats heavy food it gets full quicker than the other side. He receives liquid medicine for it from the Clinic Prescription Pharmacy.

Claimant also said that he used to have blackout spells but does not have them regularly as he used to. He has not had any in two or three months.

Lizzie Sanders, wife, testified that claimant used to have spells once a month when he would black out for a minute and a half. She would place a cloth on his head and he would come to. The spells don't come often now.

SUMMARY OF MEDICAL EVIDENCE

Medical evidence in the record was submitted by St. Catherine Hospital, Dr. Jacob C. Fleischer, Dr. Edward L.C. Broomes, Dr. Byron Kilgore and Dr. Peter V. Westhaysen.

St. Catherine Hospital noted claimant's admission from January 14, 1960, to January 20, 1960 for surgical treatment of internal and external hemorrhoids.

Dr. J. C. Fleischer reported whip lash injury to claimant's cervical spine in September 1961. On January 13, 1965, the diagnosis was neurasthenia and treatment consisted of librium. It was his opinion claimant was able to work.

Dr. E. L. C. Broomes submitted reports with the most recent, on June 8, 1965, diagnosing epilepsy, duodenal ulcer, neurosis, myocarditis; and it is remarked claimant cannot be gainfully employed.

On July 28, 1965, Dr. Byron Kilgore reported psychiatric examination indicated claimant was fully oriented as to time, place, person and situation. There is no past or current evidence of a psychotic process. There was a tendency to somatization, denial and occasional resort to dissociative black-out spells when angry. Most of his complaints are of a functional or psychogenic nature. If definitive neurological evaluation reveals no organic basis for any of his symptoms, he could be expected to respond to therapy and appropriate medication. Musculature that is probably weakened by relative disuse could be built up in 3 to 6 months so he could move into full socio-economic activities.

On September 25, 1965, Dr. P. V. Westhaysen reported neurological examination revealed no evidence of organic disease or other disorder of the central nervous system. He is normally oriented in time and place and his memory is intact although not completely accurate. He has no obvious behavior disturbance but his mood suggests melancholy and some depression. The claimant has no general physical handicap and is capable of all normal and exertional physical activities. His symptoms suggest illness is on a psychiatric basis.

The Clinic Pharmacy reported on December 18, 1965, that claimant has been having prescriptions filled since October of 1964.

STATEMENT OF THE LAW AND ISSUES

The provisions of the Social Security Act prior to the 1965 amendments allow a person to file for disability insurance benefits at any time within nine months before the first month for which he can be entitled to benefits, where a waiting period is required, and to file for the establishment of a period of disability at any time within three months before the first day that a period of disability can begin for him; and benefits cannot be paid, nor a period of disability established, on an application filed before the time limits listed above.

The 1965 amendments eliminate the requirement that an individual be under a disability at the time his disability insurance benefits application is filed and permit entitlement to benefits and/or freeze claims to be determined (although no benefits are allowable prior to September, 1965) on the basis of an application filed within twelve months after the period of disability ended. The prospective life of an application is extended until the final decision by the Secretary, or a decision upon judicial review thereof, if the claimant is found to meet all the requirements for entitlement to such benefits.

The 1965 amendments continue in effect the special earnings requirements for entitlement to disability insurance benefits or establishment of a period of disability for an individual, namely, that the individual must have not less than 20 quarters of coverage during the 40-quarter period in which the disability began.

The term "disability" was described in sections 223(c)(2) and 216(i)(1) of the Act, prior to amendment in 1965, as an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. Under the revised definition the impairment, or impairments, must be of the same degree of severity as previously, but the 1965 amendments delete from the definition of disability the requirement that the individual's impairment must be one which can be expected to be of long-continued and indefinite duration or result in death and substitute the requirement that the impairment has lasted, or can be expected to last, a continuous period of twelve months, or to result in death.

The term "period of disability" is described as a continuous period of not less than six full calendar months in which an individual was under a disability. A period of disability ends with the close of the second month following the month in which the disability ceases.

On the basis of the foregoing evidence the question before the Hearing Examiner is whether or not the claimant is

entitled to disability insurance benefits and to the establishment of a period of disability under sections 223(a) and 216(i) of the Social Security Act, as amended. The issue is specifically dependent on whether the claimant was under a disability of the required severity and duration beginning at a time when the earnings requirement was met and continuing through the date of the hearing examiner's decision and, if the claimant had been under a disability which has ceased, whether the period of disability ended no more than twelve months earlier than the claimant's application therefor was filed.

EVALUATION OF MEDICAL EVIDENCE AND VOCATIONAL FACTORS

Whether the claimant satisfied the requirements of the statute so that he can obtain disability insurance benefits as well as a disability "freeze" depends upon application of the facts to the definition of the term "disability" in the statute. It is the legal obligation of the claimant to satisfy each test enumerated in the law. It has been held in *Carquerville* v. *Flemming*, 268 Fed. 2d 875, and *Dowell* v. *Folsom*, 157 Fed. Supp. 46, that the burden of proof rests upon one filing a claim with an administrative agency to establish that the conditions of eligibility have been met. Accordingly, the claimant must not only establish the existence of a medically determinable physical or mental impairment of the severity and duration set forth in the statute, within the period in which the special earnings requirements are met, but also prove inability to engage in any substantial gainful activity by reason of such impairment. Satisfaction of one of these two tests is insufficient.

The Social Security Regulations specify that: "In order to establish that a medically determinable physical or mental impairment * * * is present there should be evidence that medically discernible anatomical, physiological, biochemical or psychological aberrations exist. Allegations of inability to work as a result of impairment such as dyspnea (shortness of breath), pain, lack of musculo-

skeletal function, decreased vision or hearing, decreased memory, etc., should be shown to result from structural, physiological or psychological changes which can be identified by the use of clinical and laboratory diagnostic techniques. An alleged impairment is medically determinable only if it can be verified by the use of clinical and laboratory diagnostic techniques." (20 CFR 404.1510(a)).

Consideration of the submitted medical reports and evidence of record takes into account the diagnoses and opinions offered by doctors. Emphasis must be placed, however, upon the results of the physical, clinical and laboratory findings supporting the diagnosed impairments and revealing the extent of dysfunction imposed by such diagnosed conditions.

In this case the claimant's earnings record, as pointed out above, qualifies him for insurance coverage through but not beyond June 30, 1962. Disability as defined in the Act must have existed prior to that date in order for the claimant to be eligible for benefits now. Accordingly, only the evidence relating to the period before that date may be considered material.

The medical reports prior to 1965 do not indicate the existence of epilepsy. Although the June 8, 1965, report of Dr. Broomes listed subjective symptoms described as epileptic seizures, no clinical or objective findings were noted. It is observed that Dr. Westhaysen took note of claimant's history of headaches, dizzy spells and "blackouts" and considering diagnostic procedures including skull x-rays indicating no pathological intracranial calcification and electroenesphalogram indicating no focal abnormality and no seizure discharges, found no disorder of the central nervous system. The hearing examiner finds more persuasive the report of Dr. Westhaysen, a specialist in neurological surgery. Furthermore, the testimony of claimant and his wife was that seizures are less frequent and do not occur often now. The evidence indicates very infrequent spells and that claimant is not prevented thereby from the reasonably regular performance of services.

It is important, moreover, to note that medical authorities feel epileptics should be encouraged to perform some gainful occupation. A Veterans Administration study includes a detailed review and analysis of actual occupations, with specific job descriptions of positions successfully filled on a full-time basis in a large variety of occupations and crafts, by persons with medically established epilepsy. ("Occupations of Epileptic Veterans of World War II and Korean Conflict." VA Pamphlet 22-6, Department of Veterans Benefits, Veterans Administration, January 1960). The job distribution shown by this recent, comprehensive official survey established that persons with unquestionable epilepsy are actually continuously employed and functioning efficiently in substantial gainful activities including but not limited to numerous named jobs. The list includes a number of jobs within claimant's capabilities, and specifically mentions manual work of various sorts including service station attendant and laborer which are within claimant's work experience.

The claimant has alleged inability to work because of a number of conditions mentioned in his application and in the oral testimony. The mere presence of a physical imperfection or other ailments does not establish a statutory disability. As mentioned above, in accordance with the terms of the statute, he must establish not only the existence of a medically determinable physical or mental impairment within the period of insured coverage but also inability to be gainfully employed as a result thereof. The evidence shows that after removal of hemorrhoids in January of 1960, and until 1965, the medical attention received by claimant was from Dr. Fleischer who noted the injury to claimant's cervical spine in 1961, his treatment of claimant for neuroasthenia, and his opinion in 1965 that claimant was able to work. The record does not indicate complaints or treatment of other ailments such as heart or stomach condition, epilepsy or black out spells and does not include reports of any other intervening hospitalization or medical attention. In September of 1965 more than three years after claimant's "insured status" under the Act had expired, an examinaiton by Dr. Westhaysen indicated claimant has no general physical handi-

cap and is capable of all normal and exertional physical activities. Attention was directed to the allegations, oral testimony and the documentary evidence with respect to all of the ailments affecting the claimant but those have not been shown to exist in such severity as to prevent the reasonably regular performance of services at any time when he met the special earnings requirement of the Act.

The medical evidence reflects no psychosis or mental impairment to a degree that would prevent claimant from working. The present era is one in which psychoneurosis afflicts many people but they work with it. Claimant's nervous condition relates to an impairment but does not meet the standards of the law and regulations with respect to disability in this area. Thus, the regulations describe conditions as disabling within the meaning of the Act where there is "Damage to the brain, or brain abnormality which has resulted in severe loss of judgment, intellect, orientation or memory" or "Mental disease (e.g., psychosis or severe psychoneurosis) requiring institutionalization or constant supervision of the affected individual." (20 CFR 401.1502(a)). Such intensive care is not required in the case of claimant but he could benefit from medication and visits to a psychiatrist and working. A need for psychotherapy is not incompatible with occupational activity. Claimant does not have a psychosis and the medical evidence does not indicate a psychotic process in the past; Dr. Kilgore noted that he was fully oriented which was corroborated by Dr. Westhaysen who additionally remarked that claimant's memory is intact, he has no obvious behavior disturbance and there is no evidence of organic disease or other disorder of the central nervous system. The evidence does not establish that the claimant was affected sufficiently by reason of a nervous condition to significantly reduce his ability to perform remunerative work.

FINDINGS

In the light of the entire evidence and of the foregoing considerations, the Hearing Examiner finds that the claimant last met the special earnings requirements of

the law on June 30, 1962, and that the claimant has not established, under the pre-1965 and 1965 definitions of disability, that he has impairments, either singularly or in combination, of such severity as to preclude him from engaging in any substantial gainful activity at any time when he met the special earnings requirement of the Act.

DECISION

It is the decision of the Hearing Examiner that the claimant is not entitled to disability insurance benefits or to a period of disability under the pre-1965 law or the 1965 Amendments of the Social Security Act.

/s/ Maxon N. Rapport
MAXON N. RAPPORT,
Hearing Examiner

Date: February 24, 1966

Mister Sanders, C1 & W/E
A/N 260-36-4656

EXHIBITS

Exhibit No.

1. Claimant's Application for Disability Insurance Benefits filed 1-30-64
2. Copy of disallowance letter dated 6-2-65
3. Claimant's Request for Reconsideration filed 6-7-65
4. Disability Determination by State Agency dated 10-1-65, affirmed by Social Security Administration 10-26-65
5. Copy of Notice of Reconsideration Determination dated 10-29-65
6. Application for Social Security Account Number filed 11-14-44
7. Earnings Record certified 2-5-64
8. Report of Contact with claimant dated 1-30-64
9. Report of Contact with claimant dated 10-19-64
10. Report of Work Activity dated 11-9-64
11. Report of Contact with claimant dated 12-18-64
12. Report of contact regarding date of birth dated 1-15-65
13. Report of Contact with claimant dated 6-7-65
14. Report of Contact with claimant dated 11-16-65
15. Medical report from St. Catherine Hospital dated 2-10-64 covering treatment from 1-14-60 through 1-20-60
16. Medical report signed by Dr. J. C. Fleischer dated 2-16-65 covering treatment in September 1961
17. Report of Contact with Dr. Fleischer dated 1-13-65
18. Medical report signed by Dr. J. C. Fleischer dated 1-13-65

EXHIBITS (Continued)

Exhibit No.

19. Professional Qualifications of Dr. Jacob C. Fleischer
20. Medical report signed by Dr. H. L. C. Broomes (undated) received 12-23-64 covering treatment
21. Report of Contact with Dr. Broomes dated 1-15-65 regarding treatment from December 1964 through 1-14-65
22. Medical report signed by Dr. E. L. C. Broomes dated 6-8-65 covering treatment from 11-5-65 (sic) through 6-8-65
23. Professional Qualifications of Dr. Edward L. C. Broomes
24. Case Development Sheet signed by Dr. Luis F. Gonzalez dated 5-22-65
25. Professional Qualifications of Dr. Luis F. Gonzalez
26. Medical report signed by Dr. Byron Kilgore dated 7-28-65 covering consultative psychiatric examination
27. Professional Qualifications of Dr. Byron Kilgore
28. Medical report signed by Dr. Peter V. Westhaysen dated 9-25-65 covering consultative neurological examination on 8-24-65
29. Professional Qualifications of Dr. Peter V. Westhaysen
30. Case Development Sheet signed by Dr. Ira A. Liebson dated 5-22-65
31. Case Development Sheet signed by Dr. Ira A. Liebson dated 10-26-65
32. Professional Qualifications of Dr. Ira A. Liebson

SUBMITTED DURING ORAL HEARING

33. Note from Clinic Pharmacy, Inc. covering prescriptions filled from October 1964 through December 16, 1965

EXHIBIT #2

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
June 13, 1966

HA:C
Account Number
260-36-4656

ACTION OF APPEALS COUNCIL ON
REQUEST FOR REVIEW

Mr. Mister Sanders
4905 Alexander
East Chicago, Indiana 46312

Dear Mr. Sanders:

Your request for review of the hearing examiner's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the hearing examiner's evaluation of the facts and the reasoning in his decision, and your reasons for believing your claim should be allowed.

The Appeals Council has decided that the decision of the hearing examiner is correct. Further action by the Council would not, therefore, result in any change which would benefit you. Accordingly, the hearing examiner's decision stands as the final decision of the Secretary in your case.

If you desire a review of the hearing examiner's decision by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside *within sixty (60) days* from this date. For your information as to the action in the district court, your attention is directed to section 205 (g) of the Social Security Act, as amended, (section 405

(g), Title 42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

/s/ [Illegible]
[Illegible]
Chairman, Appeals Council

cc: BSB, DDO, Baltimore

D/O, Hammond, Indiana
H/E Rapport, Chicago, Illinois (South)

ITRager:er

EXHIBIT [Illegible]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

Name and Address of Claimant:

TO: Mister Sanders
609 E. 150th St.
East Chicago, IN

NOTICE OF DISMISSAL

Please Read Carefully

If you disagree, in whole or in part, with the enclosed order of dismissal, you may request the Appeals Council to review it. However, your request for review must be filed *within 60 days* following the date shown below. You, or your representative, may file the request for review with your local social security office, with the hearing office, or with the Appeals Council.

This notice and enclosed copy of
order of dismissal mailed

January 15, 1973

cc:
Name and Address of Representative:

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

ORDER OF DISMISSAL

In the case of

Mister Sanders
(Claimant)

(Wage Earner) (Leave blank if same as above)

Claim for

Period of Disability and
Disability Insurance Benefits

260-36-4656
(Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

This case is before the undersigned Administrative Law Judge upon a request for hearing filed on October 3, 1973 by the claimant, Mister Sanders, who disagrees with the determination of the Bureau of Disability Insurance, Social Security Administration, that he is not entitled to a period of disability and disability insurance benefits under the Social Security Act.

The claimant filed a prior application for a period of disability and disability insurance benefits on January 30, 1964. The claimant complained of various impairments in that first application that included epilepsy and "blackout spells" which he alleged caused him to be unable to work for about 4½ years prior to his application of January 30, 1964. On June 2, 1965, the claimant was notified by the Bureau of Disability Insurance Benefits, Social Security Administration that his application

was denied. He requested reconsideration of this denial and was subsequently notified by a letter dated October 29, 1965 that the original denial had been affirmed. Thereafter, the claimant still being dissatisfied filed a request for hearing and a hearing was held on December 21, 1965. The Hearing Examiner (now called Administrative Law Judge) affirmed the Administration on February 24, 1966 and determined that the claimant was not entitled to disability insurance benefits or to a period of disability. The Appeals Council by a letter dated June 13, 1966 notified the claimant that the decision of the Administrative Law Judge was the final decision of the Secretary of Health, Education and Welfare and advised the claimant that he had the right to commence a civil action in the United States District Court within sixty days to review the decision of the Administrative Law Judge. The claimant did not file a civil action for review in the United States District Court.

The claimant filed a second application to establish a period of disability and for disability insurance benefits on March 5, 1973, wherein he again alleged epilepsy and "blackout spells." On May 25, 1973, the claimant was notified by the Bureau of Disability Insurance, Social Security Administration, that his application was denied. He requested reconsideration of this denial and was subsequently notified by letter dated September 28, 1973, that the original denial had been affirmed. Thereafter the claimant still being dissatisfied, filed a request for hearing on October 3, 1973. Since the decision of the Administrative Law Judge on February 24, 1966, the claimant submitted additional medical evidence that indicates that the claimant has complained of epilepsy and "blackout spells" since 1964.

ISSUES AND APPLICABLE LAW

The general issues before the Administrative Law Judge is whether the claimant is entitled to a period of disability and to disability insurance benefits under the Act. The specific issue is whether the claimant is entitled to

have his prior application reopened since more than four years have elapsed since the decision of the Administrative Law Judge on February 24, 1966 and the claimant last met the earnings requirements of the Social Security Act on June 30, 1962.

20 CFR 404.937 provides:

> "The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> > (a) Res judicata. Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision . . ."

20 CFR 404.951 provides:

The Appeals Council may deny a party's request for review or it may grant review and either affirm or reverse the Administrative Law Judge's decision. The decision of the Appeals Council, or the decision of the Administrative Law Judge where the request for review is denied (see 404.947), shall be final and binding upon all parties to the hearing unless a civil action is filed in the district court of the United States under the provisions of section 205(g) or section 1869(b) of the Act, or unless the decision is revised under the provisions described in § 404.956.

20 CFR 404.957 provides in pertinent part:

. . . a decision of a hearing examiner (Administrative Law Judge) which is otherwise final . . . § 404.951 may be reopened:

* * * *

(c) at any time when

* * * *

(8) such . . . decision . . . is unfavorable, in whole or in part, to the party thereto but only for the purpose of correcting . . . error on the face of the evidence on which such . . . decision was based.

RATIONALE

The Appeals Council on June 13, 1966 specifically advised the claimant that the decision of the Administrative Law Judge was the final decision of the Secretary of Health, Education and Welfare and that the claimant had the right to request a review in the United States District Court within sixty days of that final decision pursuant to section 205(g) of the Social Security Act (42 U.S.C. § 405(g)). The claimant did not file for a review in the United States District Court and the decision of the Administrative Law Judge became final and binding upon the claimant. Since more than four years have elapsed since the decision became final it can only be reopened under the provisions of 20 CFR 404.957 (c)(1) through (9). The only possible applicable section is 20 CFR 404.957(c)(8). I find that there is no error on the face of the evidence on which the decision of February 24, 1966 was made.

In order for the claimant to be entitled to a period of disability or to disability insurance benefits, it was necessary for him to establish that he was under a "disability" commencing on or prior to June 30, 1962 when he last met the earnings requirements of the Act. Since the claimant's special earnings requirement expired on June 30, 1962, there is no unadjudicated period subsequent to the final decision of the Secretary on February 24, 1966. The parties and the issues are the same in the both applications and the additional medical evidence is merely repititions and cumulative. The allegations of the claimant and the additional evidence submitted do not warrant a change in the conclusion reached in the prior decision. Any further adjudica-

tion of these identical matters is barred under the doctrine of *res judicata.*

It is well settled that a claimant may not, by filing repeated applications obtain repeated determinations or decisions with respect to the same issues or renew rights which he allowed to lapse by his failure to seek administrative or judicial review within the statutory period for such review. See: *Sangster* v. *Gardner,* 374 F 2d 498 (6th Cir. 1967). *Domizik* v. *Cohen,* 413 F 2d 5 (3rd Cir. 1969); and *Leviner* v. *Richardson,* 443 F 2d 1338 (4th Cir. 1971), and cases cited therein.

FINDINGS

1. That there is no basis for reopening the prior decision of February 24, 1966.

2. That the prior decision of February 24, 1966 is final and binding as to the claimant's application filed on January 30, 1964.

3. That the prior decision of February 24, 1966 as to the claimant's first application filed on January 30, 1964 is *res judicata* as to his current application filed on March 5, 1973 since both applications involved the same parties, issues and facts.

4. That the issue of disability during the previously adjudicated period is dismissed under 20 CFR 404.937 (a).

DECISION

Now therefore, in view of the foregoing, it is the decision of the Administrative Law Judge, that the decision of the Administrative Law Judge on February 24, 1966 on claimant's application of January 30, 1964 is final and will not be reopened, further, pursuant to the provisions of 20 CFR 404.937(a), the request for hearing filed herein on October 3, 1973 by the claimant, Mister Sanders, is hereby dismissed.

/s/ James H. Alesia
JAMES H. ALESIA
Administrative Law Judge

Date: January 15, 1973

EXHIBIT 4

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
5 APR 1974

IRA-2
260-36-4656
AIRMAIL

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW OF ADMINISTRATIVE LAW JUDGE'S DISMISSAL

Mr. Mister Sanders
609 East 150th Street
East Chicago, Indiana 46312

Dear Mr. Sanders:

Your request for review of the administrative law judge's dismissal has been carefully considered by the Appeals Council. The Council's consideration of your case included the law and regulations applicable to your claim, the action taken by the administrative law judge and your reasons for believing that your request for hearing should not have been dismissed.

The Appeals Council has concluded that the dismissal action of the administrative law judge is correct. Accordingly, the determination dated February 24, 1966, stands as the final determination of this Department.

Sincerely yours,

LINDSAY E. MARRIN
Acting Member,
Appeals Council

cc:
Mr. William A. Kowalski
Attorney at Law
East Chicago, Indiana 46312
Division of Benefit Services, Balt.
BO, East Chicago, In
HO. Chicago, Il (ALJ Alesia)

DISTRICT COURT ORDER AND MEMORANDUM

[The District Court Order and Memorandum of November 15, 1974, is printed at pages 13a-14a of the Appendix to the Petition for Certiorari.]

COURT OF APPEALS DECISION AND ORDER

[The Court of Appeals Decision and Order of September 12, 1975, are printed at pages 1a-12a of the Appendix to the Petition for Certiorari.]

DENIALS OF REHEARING

[The Court of Appeals Orders of December 12, 1974, denying petition for rehearing and suggestion of rehearing *en banc*, are printed at pages 15a-18a of the Appendix to the Petition for Certiorari.]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT

v.

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, DEFENDANT-APPELLEE

MOTION TO LODGE ADMINISTRATIVE RECORD

Caspar Weinberger, by his undersigned counsel, hereby requests leave of this Court to lodge the Social Security Administration administrative record with the Court in the above-captioned case. In support of this motion counsel states:

1. Claimant instituted this suit to review a decision of the Secretary of Health, Education and Welfare denying his latest application for social security disability benefits on the ground of *res judicata*. The district court, finding that it lacked subject matter jurisdiction, granted the Secretary's motion to dismiss. The instant appeal raises two issues: (1) Whether the Secretary's decision declining to reopen claimant's prior application may be judicially reviewed; (2) in the event the decision is subject to judicial review, whether that decision was arbitrary, capricious, or an abuse of discretion.

2. Should this Court find itself empowered to review the Secretary's decision on reopening, the Court may wish to consider the entire administrative record. Although this record was not filed with the district court, this Court may, of course, take judicial notice of the administrative record. *Shuttleworth* v. *City of Birmingham, Ala.*, 394 U.S. 147 (1969); *Butler* v. *Eaton*, 141 U.S. 240 (1890); *Wilson* v. *Sigler*, 285 F.2d 372 (C.A. 8, 1961).

WHEREFORE, defendant-appellee respectfully requests that this Court grant his motion and allow the

Social Security Administration's administrative file in the above-captioned case to be lodged with this Court.[1]

Respectfully submitted,

ROBERT E. KOPP
(202) 739-3389

RICHARD A. OLDERMAN
(202) 739-5325
Attorneys
Appellate Section,
Civil Division
Department of Justice
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 1975, I served the foregoing Motion to Lodge Administrative Record upon counsel for the appellant by causing a copy to be mailed, postage prepaid, to:

William A. Kowalski, Esquire
Kowalski, Kanz & O'Drobinsk
4732 Indianapolis Boulevard
East Chicago, Indiana 46312

RICHARD A. OLDERMAN,
Attorney

[1] The administrative record is presently in the possession of the Social Security Administration, and we are advised that it will be available within two weeks from today.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

May 1, 1975

Before Hon. Thomas E. Fairchild, Chief Judge

No. 75-1069

MISTER SANDERS, PLAINTIFF-APPELLANT,

vs.

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
(H 74 C 146)

This matter comes before the Court on the "MOTION TO LODGE ADMINISTRATIVE RECORD" filed herein on April 30, 1975 by counsel for the defendant-appellee. On consideration whereof,

IT IS ORDERED that said motion be and the same is hereby GRANTED. The Social Security Administration's administrative file in this matter may be lodged, but not filed, in this Court.

SUPREME COURT OF THE UNITED STATES

No. 75-1443

F. DAVID MATHEWS, Secretary of Health, Education and Welfare, PETITIONER

v.

MISTER SANDERS

ORDER ALLOWING CERTIORARI—Filed June 1, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

Mr. Justice Stevens took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 217752 294